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No. 06-593

In the Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD., ET AL.,
PETITIONERS

v.

EVELYN COKE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a longstanding Fair Labor Standards Act regulation, 29 C.F.R. 552.109(a), promulgated by the Department of Labor pursuant to delegated rulemaking authority and after notice and comment, was not entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and was not enforceable.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether a long-standing Department of Labor (DOL) regulation, 29 C.F.R. 552.109(a), which was promulgated pursuant to statutory rulemaking authority after notice and comment, is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and is enforceable. At the Court's invitation, the United States filed a brief at the petition stage when this case first came before the Court. 126 S. Ct. 1189 (2006) (granting writ of certiorari, vacating, and remanding for further consideration in light of DOL's Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005), Pet. App. 50a-64a).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay a minimum wage and, for hours of work exceeding 40 in a work week, overtime compensation at a rate of one and one-

half times an employee's regular rate of pay. 29 U.S.C. 206(a), 207(a)(1). Before 1974, covered employees included those "engaged in commerce or in the production of goods for commerce" (individual coverage), and, since 1961, those "employed in an enterprise engaged in commerce or in the production of goods for commerce" (enterprise coverage). 29 U.S.C. 206(a) and 207(a)(1) (1970). The Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, extended the FLSA's minimum wage and overtime requirements to "domestic service" employees, 29 U.S.C. 206(f), 207(*l*), but specifically exempted such employees providing "companionship services" to the elderly or infirm. That exemption applies to:

> any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

29 U.S.C. 213(a)(15). In addition to this specific grant of authority to "define[] and delimit[]" such terms as "domestic service employment" and "companionship services," which Congress did not otherwise define, Congress also authorized the Secretary of Labor "to prescribe necessary rules, regulations, and orders" with regard to the 1974 Amendments. § 29(b), 88 Stat. 76.

Pursuant to both grants of authority, DOL promulgated regulations describing the application of the FLSA to domestic service employees. 29 C.F.R. Pt. 552. Adopted in February 1975, those regulations are divided into two subparts, "General Regulations" and "Interpretations." Their purpose is to "provide[] necessary rules for the application of the [FLSA] to domestic service employment" in accordance with the 1974 Amendments. 29 C.F.R. 552.2(a).

"[C]ompanionship services" are defined, in the "General Regulations" subpart, as "those services which provide fellow-

ship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." 29 C.F.R. 552.6. A regulation in the "Interpretations" subpart, 29 C.F.R. 552.109(a), exempts domestic service employees providing companionship services from the FLSA's minimum wage and overtime pay requirements when they are employed by a third party:

> Employees who are engaged in providing companionship services, as defined in [29 C.F.R.] § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15) [of the FLSA].

29 C.F.R. 552.109(a).

A separate regulation in the "General Regulations" subpart states that "domestic service employment," as used in Section 13(a)(15) of the Act, "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3. A regulation in the "Interpretations" subpart explains that the meaning of "domestic service employment" derives from Social Security regulations and the "generally accepted" meaning of the term, and includes persons frequently referred to as "private household workers." 29 C.F.R. 552.101(a) (citations omitted).

All the regulations at issue, including Section 552.109(a), were issued pursuant to notice-and-comment rulemaking in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. Initially, DOL proposed that employees who provide companionship services, but "are employed by an employer other than the families or households using such services," would not be covered by the companionship exemption if the third-party employer would qualify as a covered enterprise under Sections 3(r) and 3(s)(1) of the FLSA, on the ground that such third-party employment was covered by the

FLSA before the 1974 Amendments. See 39 Fed. Reg. 35,385 (1974) (proposed § 552.109). Thus, under the original proposal, domestic service employees providing companionship services and working for a third-party employer would fall within the exemption only if their employer did not satisfy the Act's "enterprise" test for coverage.[1]

After receiving and considering comments on the proposed rule, however, DOL decided that *all* third-party employment, without regard to the employer's status as a covered enterprise, should be included within the scope of the companionship services exemption. See 40 Fed. Reg. 7405 (1975). DOL acknowledged that its decision constituted a change from the proposed rule, but explained that under the text of Section 13(a)(15) of the Act, the "exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." *Ibid.* "This interpretation," DOL continued, "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Ibid.* Thus, the final regulation promulgated to implement the 1974 Amendments expressly applies the companionship services exemption to employees who provide companionship services and "are employed by an employer or agency other than the family or household using their services." 29 C.F.R. 552.109(a).

In 1993, DOL proposed regulatory amendments to limit the companionship services exemption to employees of a third-party employer or agency only when the employee is jointly employed by the person receiving the services. See 58 Fed. Reg. 69,312. Most commenters opposed the proposed change. See 60 Fed. Reg. 46,797-46,798 (1995). In 1995, DOL reopened the comment period for the 1993 proposal to consider whether to revise it to allow the companionship services

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[1] At the time, to qualify as an "enterprise," an employer, *inter alia*, had to have annual gross sales of at least $250,000. See 29 U.S.C. 203(s)(1) (1970). That limit has since been changed to $500,000. See 29 U.S.C. 203(s)(1)(A)(ii).

exemption to also apply to employment, either jointly with a third-party agency or otherwise, by a government agency or family member acting on behalf of an incapacitated elderly or infirm person. *Id.* at 46,798. Commenters expressed concern with the changes, and DOL did not adopt either the 1993 or the 1995 proposal. See 66 Fed. Reg. at 5485.

In January 2001, DOL again proposed to amend the regulations to, among other things, eliminate the exemption in Section 552.109(a) for employers other than the family or household for whom the services are provided. 66 Fed. Reg. 5485, 5488. In the notice of proposed rulemaking, DOL recognized that "[u]nder the existing regulation, employees who are employed by an employer or agency other than the family or household using the companionship services may still qualify for the exemption." *Id.* at 5485. DOL, at that time, expressed the view that the regulations contain an internal inconsistency because 29 C.F.R. 552.3, in defining "domestic service employment," refers to an employee's employment in or about the private home "of the person by whom he or she is employed," and also opined that the proposed new rule would not have a significant economic impact. 66 Fed. Reg. 5485-5486. In 2002, however, DOL withdrew the proposed rule because numerous commenters, including the Small Business Administration (SBA) and the Department of Health and Human Services (HHS), challenged DOL's conclusion that the rule would have little economic impact. See 67 Fed. Reg. 16,668. Thus, although DOL has periodically sought public comment on whether to amend the third-party employer regulation at 29 C.F.R. 552.109(a), the regulation has remained unchanged since its adoption in 1975.

2. Petitioners employ approximately 40 home health care aides, who provide companionship services to approximately 30 homebound patients in New York. Pet. App. 34a, 84a. Respondent is a former employee of petitioners who worked as a home health care attendant. *Id.* at 34a. Respondent brought suit against petitioners under the FLSA, alleging

that despite working more than 40 hours a week, she never received overtime payments, and that her hourly wage was less than the minimum wage. *Ibid.*

The district court granted petitioners' motion for judgment on the pleadings, holding that respondent could not state a claim as a matter of law because home health care workers are exempt from the minimum wage and overtime requirements in 29 U.S.C. 206 and 207 under the companionship services exemption in 29 U.S.C. 213(a)(15) and its implementing regulations. Pet. App. 47a-48a. The court applied the standard set forth in *Chevron* for reviewing legislative rules and held that 29 C.F.R. 552.109(a) is not arbitrary, capricious, or manifestly contrary to the FLSA in including employees of third-party employers within the scope of the companionship services exemption. Pet. App. 39a-47a.

3. In 2004, the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 7a-32a. The court held that 29 C.F.R. 552.109(a) is not entitled to *Chevron* deference. Pet. App. 23a-28a. The court acknowledged that the FLSA's companionship services exemption expressly grants authority to DOL to define and delimit the terms of the statutory provision; that the regulation is both contemporaneous and longstanding; and that Congress had amended 29 U.S.C. 213 seven times since 1974 without expressing disapproval of the agency's interpretation. *Id.* at 24a. The court also recognized that Section 552.109(a) was the product of notice-and-comment rulemaking; that all other courts that have considered the issue have applied *Chevron* deference and upheld the regulation; and that "the rule 'grants rights, imposes obligations, or produces other significant effects on private interests' as legislative regulations do." *Id.* at 24a-25a, 26a (citation omitted). The court concluded, however, that DOL did not intend to use its legislative rulemaking authority when promulgating 29 C.F.R. 552.109(a) because the regulation is included in Subpart B of Part 552, entitled "Interpretations," and because another regulation (29 C.F.R. 552.2(c)) states that the "defini-

tions required by [29 U.S.C. 213(a)(15)] are contained in §§ 552.3, 552.4, 552.5 and 552.6." Pet. App. 26a. Relying on *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), the court reasoned that the regulation is therefore "interpretive," rather than "legislative," and that it is not entitled to *Chevron* deference. Pet. App. 26a-27a.

The court then held that the third-party employer regulation is unenforceable under the less deferential standard set forth in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 29a. In the court's view, the regulation is inconsistent both with Congress's likely intent in enacting the 1974 Amendments and with 29 C.F.R. 552.3's definition of domestic service employment, and was the product of inadequate reasoning. Pet. App. 29a-32a.

4. Petitioners filed a petition for a writ of certiorari, and the Court invited the Solicitor General to express the views of the United States. Thereafter, DOL issued an authoritative Advisory Memorandum making clear its view that the promulgation of 29 C.F.R. 552.109(a) was an exercise of DOL's expressly conferred legislative rulemaking authority. See Pet. App. 50a-64a. Specifically, the Advisory Memorandum states that DOL considers Section 552.109 to be a legally binding legislative rule. Pet. App. 63a-64a. The Advisory Memorandum also explains that Section 552.109(a) represents the best reading of the companionship services exemption in 29 U.S.C. 213(a)(15), Pet. App. 50a-52a; is consistent with other regulatory provisions, *id.* at 54a-62a; and best reflects Congress's concern "that working people could not afford to pay for companionship services if they had to pay FLSA wages," *id.* at 52a. Consistent with the recommendation of the United States, the Court granted the petition for a writ of certiorari, vacated the court of appeals' decision, and remanded the case so that the Second Circuit could consider the Advisory Memorandum. 126 S. Ct. 1189 (2006).

5. On remand, the court of appeals again denied *Chevron* deference to 29 C.F.R. 552.109(a). Pet. App. 2a-6a. The court

acknowledged that Congress granted legislative rulemaking authority to DOL. *Id.* at 3a. However, the court adhered to its original conclusion that DOL did not intend the third-party employer regulation to be a legislative rule. *Ibid.* The court discounted DOL's explanation in the Advisory Memorandum that it had always considered Section 552.109(a) to be a legally binding legislative rule, reasoning that the regulation could have been intended merely as internal guidance not meant to have the force of law outside the agency. *Id.* at 3a-4a.

The court again invoked *Skidmore*, and concluded that nothing in DOL's Advisory Memorandum convinced it that its original decision was in error. Pet. App. 4a. The court acknowledged, contrary to its earlier decision, see *id.* at 29a-30a, that consideration of congressional intent did not resolve whether 29 C.F.R. 552.109(a) is a permissible interpretation of the statute. Pet. App. 4a-5a. However, the court rejected the reasoning of the Advisory Memorandum and deemed that regulation inconsistent with the other regulations in 29 C.F.R. Pt. 552, including Section 552.3. In addition, the court stated that the Advisory Memorandum did little to allay its concern regarding the consistency of DOL's position over time and the thoroughness of its original consideration and reasoning when it promulgated Section 552.109(a). Pet. App. 5a-6a.

SUMMARY OF ARGUMENT

I. DOL's third-party employer regulation at 29 C.F.R. 552.109(a) should be analyzed under *Chevron*'s deferential framework because it was promulgated pursuant to an express statutory grant of rulemaking authority and after notice and comment. See *Mead*, 533 U.S. at 226-227, 229-230; *Chevron*, 467 U.S. at 843-844. DOL's placement of the regulation in a subpart of its regulations entitled "Interpretations" does not change the analysis. Both subparts of the regulation were subject to notice and comment and both were intended to have the force of law, as authoritatively explained in DOL's Advi-

sory Memorandum, Pet. App. 51a, 63a-64a. See *Auer* v. *Robbins*, 519 U.S. 452, 457-458 (1997).

II. Under *Chevron*, such a legislative rule should be sustained unless it is "arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. The FLSA's companionship services exemption does not address third-party employment. See 29 U.S.C. 213(a)(15). DOL's regulation at 29 C.F.R. 552.109(a), however, specifically provides that the exemption applies to employees of third parties. That regulation is a reasonable interpretation of the statutory companionship services exemption which, by its terms, applies to "any employee employed in domestic service employment to provide companionship services * * * (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. 213(a)(15). The regulation also furthers Congress's intent to ensure that working people would be able to afford companion services, a rationale that applies equally to all companions, irrespective of the identity of their employer. Advisory Mem., Pet. App. 52a.

As DOL explained in its Advisory Memorandum, Section 552.109(a) was promulgated after notice and comment as an exercise of legislative rulemaking authority and is the only regulation that directly addresses the third-party employment question. Pet. App. 63a. There is no conflict between DOL's third-party employer regulation and the other regulations in Part 552, including 29 C.F.R. 552.3, which addresses the kind of work that qualifies as domestic service and where it must be performed. *Ibid.* While 29 C.F.R. 552.3 could have been more artfully drafted to accommodate the third-party employment situation, Section 552.109(a) addressed that situation directly, and there is no basis for manufacturing a conflict. In all events, DOL's interpretation of its own regulations is entitled to deference. *Auer*, 519 U.S. at 461.

DOL carefully considered competing policy interests implicated by the third-party employer regulation both when it first promulgated the regulation in 1975, and in the over 30

ensuing years. In all that time, DOL has repeatedly come to the same conclusion, that the third-party employer regulation reasonably serves the interests Congress wanted to promote in enacting the companionship services exemption. That careful consideration and consistency over a long period of time provides a further reason to uphold the regulation.

ARGUMENT

I. DOL'S THIRD-PARTY EMPLOYER REGULATION IS ENTITLED TO *CHEVRON* DEFERENCE

Under *Chevron*, an agency's reasonable interpretation of a silent or ambiguous statute that Congress has charged it with administering is entitled to deference. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." 467 U.S. at 843-844. Such "legislative regulations" must be upheld "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843. If the legislative delegation to the agency on a particular question is "implicit" rather than "explicit," the agency's interpretation must be upheld if it is "reasonable." *Id.* at 844. Under either standard, a reviewing court cannot reject the agency's interpretation "simply because the agency's chosen resolution seems unwise." *Mead*, 533 U.S. at 229.

Thus, deference is required under *Chevron* at least where: (1) Congress expressly granted authority to the agency to make rules carrying the force of law; and (2) the agency promulgated such rules pursuant to that authority. See *Mead*, 533 U.S. at 226-227, 233 (denying *Chevron* deference to a tariff classification ruling because the Customs Service did not have a "lawmaking pretense in mind" when it issued the ruling). *Mead* highlights the importance of notice-and-comment rulemaking as an indication that an agency interpretation has the "force of law" and should be analyzed under *Chevron*'s framework. *Id.* at 230 ("[T]he overwhelming number of our

cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). And since *Mead*, the Court has expressly held that *Chevron* applies where an agency with express legislative rulemaking authority issues rules after notice and comment. See *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 45 (2002) (applying *Chevron*'s framework to regulations implementing the "Single State Registration System" of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 4005, 105 Stat. 2146, 49 U.S.C. 11506(c) (1994)); *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980-981 (2005) (applying *Chevron* to a Federal Communications Commission (FCC) ruling classifying broadband cable Internet service providers under the Communications Act).

A. Congress Clearly Granted Rulemaking Authority To DOL Concerning Application Of The Companionship Services Exemption

The third-party employer regulation at 29 C.F.R. 552.109(a) easily satisfies the first of the two criteria that *Mead* identified as sufficient for *Chevron* deference. As the court of appeals acknowledged on remand, "[t]here is no dispute that Congress delegated to the Department of Labor * * * the authority to promulgate legislative rules, which carry the force of law." Pet. App. 2a-3a. That delegation was twofold. First, Congress granted the Secretary the authority to "define[] and delimit[] by regulations" the terms of the companionship services exemption. 29 U.S.C. 213(a)(15). Such a provision gives the Secretary broad authority to promulgate binding legal rules governing the construction of those terms and the application of the exemption. See *Auer*, 519 U.S. at 456-458 (FLSA provision granting the Secretary authority to "define[] and delimit[]" the Act's exemption for employees employed in an executive, administrative, or professional capacity, 29 U.S.C. 213(a)(1), gives the Secretary broad authority to issue legally binding rules). Second, Con-

gress also gave the Secretary general authority "to prescribe necessary rules, regulations, and orders" with regard to the 1974 Amendments, including the provisions governing domestic service employment. 1974 Amendments § 29(b), 88 Stat. 76. Such a statutory provision also gives the Secretary authority to promulgate binding legal rules. See *National Cable*, 545 U.S. at 980-981 (statutory authorization for FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act gave FCC broad authority to promulgate binding legal rules).

B. DOL Exercised Its Statutory Rulemaking Authority In Promulgating Section 552.109(a)

1. Section 552.109(a) also satisfies the second of the two criteria that are sufficient to trigger *Chevron* deference, because DOL promulgated the rule pursuant to its authority to issue rules with the force of law. DOL's use of notice-and-comment rulemaking to issue Section 552.109(a), see 39 Fed. Reg. at 35,382 (proposed rule); 40 Fed. Reg. at 7404 (final rule), is strong evidence that DOL promulgated that regulation pursuant to its authority to make legally binding rules. See *Mead*, 533 U.S. at 229-230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.").

Moreover, DOL has repeatedly stated that it was using its legislative rulemaking authority. DOL promulgated Section 552.109(a) at the same time it promulgated the other Part 552 regulations addressing the application of the FLSA to domestic service, and expressly invoked 29 U.S.C. 213(a)(15) and Section 29(b) of the 1974 Amendments as the authority for *all* those regulations. See 29 C.F.R. Pt. 552; 40 Fed. Reg. at 7405; 39 Fed. Reg. at 35,382. DOL further explained that the purpose of the regulations—both the "General Regulations"

and "Interpretations" subparts—is to "provide[] necessary rules for the application of the Act to domestic service employment" in accord with the 1974 Amendments. 29 C.F.R. 552.2(a). DOL thereby invoked its legislative rulemaking authority for all the Part 552 regulations, including the third-party employer regulation.

DOL confirmed that Section 552.109(a) is a legislative rule when it considered whether to revise that section in 1993, 1995, and 2001, by relying on notice-and-comment procedures, which would have been unnecessary if the provision was merely intended to provide internal agency guidance, as the court of appeals suggested. And in its December 2005 Advisory Memorandum, DOL authoritatively confirmed that it has always treated the regulation as a binding legislative rule. Pet. App. 64a. As DOL explained in 1975 and again in 2005, Section 552.109(a) makes the statutory exemption "available" to third-party employers, expressing DOL's intention, at the time the final rule was promulgated, that the availability of the companionship services exemption to third-party employers turned decisively on DOL's regulation, something that could be true only of a legislative rule. Pet. App. 63a-64a (citing 40 Fed. Reg. at 7404-7405).

2. The court of appeals nonetheless concluded that Section 552.109(a) "was self-consciously not promulgated in exercise of Congress's delegated authority," Pet. App. 26a, because DOL placed Section 552.109(a) in Part 552's "Interpretations" subpart and stated in a preamble that the Interpretations subpart sets forth "a statement of general policy and interpretation concerning the application of the [FLSA] to domestic service employees," while regulations "defining and delimiting" terms, including "[t]he definitions required by section 13(a)(15)," were in the "General" regulations subpart. Pet. App. 3a (brackets in original) (citing 39 Fed. Reg. at 35,382 and 29 C.F.R. 552.2(c)). The placement of 29 C.F.R. 552.109(a) in the "Interpretations" subpart is an insufficient basis for ignoring DOL's use of notice-and-comment proce-

dures and its express reliance on its legislative rulemaking authority.

The court of appeals placed too much weight on Subpart B's "Interpretations" heading and the preamble statement that Subpart B set out a "statement of general policy and interpretation." Such characterizations are not dispositive. See *CBS* v. *United States*, 316 U.S. 407, 416 (1942) ("The particular label placed upon [an order promulgating regulations] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."). Significantly, this Court, in *Auer*, applied *Chevron*'s framework to a DOL FLSA regulation issued pursuant to notice-and-comment rulemaking, even though it was set out in an "Interpretations" subpart rather than a "General Regulations" subpart. See 519 U.S. at 457-458 (giving *Chevron* deference to 29 C.F.R. 541.118(a) (2003)).[2] *Auer* confirms that when DOL promulgates a regulation through notice-and-comment procedures pursuant to rulemaking authority conferred by the FLSA, as DOL did here, the regulation is entitled to *Chevron* deference despite its placement in an "Interpretations" subpart.

A far more relevant consideration in determining whether a rule is legislative is whether it is "one affecting individual rights and obligations." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). Section 552.109(a) unquestionably is intended to and does affect individual rights and obligations. Indeed, the court of appeals acknowledged that Section 552.109(a) "grants rights, imposes obligations, or produces other signifi-

[2] Section 541.118(a), which was promulgated pursuant to notice-and-comment rulemaking, see 19 Fed. Reg. 1321-1322 (1954), established a salary-basis test for determining when an employee is employed in an executive, administrative, or professional capacity and thereby exempt from the FLSA's minimum wage and overtime requirements pursuant to 29 U.S.C. 213(a)(1). In 2004, the Department amended the Part 541 regulations, and the current regulations are no longer divided into "General" and "Interpretations" subparts. See 69 Fed. Reg. 22,122.

cant effects on private interests, as legislative rules do." Pet. App. 26a (internal quotation marks and citation omitted); see also *id. at* 63a-64a. Thus, the regulation has the force of law, see *CBS*, 316 U.S. at 416 ("regulations which affect or determine rights generally * * * when lawfully promulgated * * * have the force of law"), and is entitled to *Chevron* deference under *Mead* for that reason, see 533 U.S. at 226-227.

Moreover, labeling a rule as an "interpretation" does not indicate that it is not a binding legislative rule. Here, the title merely indicates that Subpart B provides interpretations of the companionship services exemption that go beyond the basic definitions provided in Subpart A to further delimit the contours of the exemption in 29 U.S.C. 213(a)(15) and provide necessary rules to implement the 1974 Amendments. *Chevron* clearly applies to such agency interpretations contained in a regulation. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). Accordingly, courts of appeals, other than the court below, have applied *Chevron*'s framework to regulations contained in Part 552's "Interpretations" Subpart. See *Madison* v. *Resources for Human Dev., Inc.*, 233 F.3d 175, 181 (3d Cir. 2000) (according *Chevron* deference to 29 C.F.R. 552.101); *McCune* v. *Oregon Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990) (upholding 29 C.F.R. 552.106 under *Chevron*). In addition, the Tenth Circuit has twice accorded Section 552.109(a) *Chevron* deference, despite its inclusion in Part 552's "Interpretations" Subpart. See *Johnston* v. *Volunteers of Am., Inc.*, 213 F.3d 559, 562 (10th Cir. 2000), cert. denied, 531 U.S. 1072 (2001); *Welding* v. *Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004).[3]

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[3] Contrary to respondent's argument (Br. in Opp. 13-14), DOL did not intend to adopt the definition of "interpretation" in 29 C.F.R. 790.17(c) for every regulation it placed in a subpart entitled "Interpretations." Section 790.17(c) adopts that definition only as an interpretation of provisions of the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, that provide a defense to employers who prove that they acted "in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or

C. *Chevron* Deference Is Appropriate Even If 29 C.F.R. 552.109(a) Is Not A Legislative Rule

Even assuming, *arguendo*, that Section 552.109(a) is not a legislative rule that must be upheld unless it is arbitrary, capricious, or manifestly contrary to the FLSA, it remains a formal and authoritative construction of the Act that warrants deference under *Chevron* and must be sustained as long as it is reasonable. See 467 U.S. at 844. This Court in *Mead* did not hold that *Chevron* deference is appropriate only to interpretations embodied in legislative rules or formal adjudications. To the contrary, the Court specifically held that the want of formal procedure in *Mead* itself did not decide the case, noting that the Court has sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was affected. See 533 U.S. at 231

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interpretation" of certain agencies. 29 U.S.C. 258 and 259(a). In that context, "interpretation" means "a statement 'ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language,'" including "bulletins, releases, and other statements." 29 C.F.R. 790.17(c); cf. 29 C.F.R. 790.17(b) ("regulation" and "order" mean authoritative and binding rules). Respondent also cites a number of cases allegedly supporting her position that DOL's "interpretations" of statutory exemptions receive only *Skidmore* deference. Br. in Opp. 15. These cases are readily distinguishable because they involved statements or positions adopted without notice and comment. See, *e.g.*, *Freeman* v. *NBC*, 80 F.3d 78, 83-84 (2d Cir. 1996) (concluding that 29 C.F.R. 541.302 is an interpretive regulation because it was not promulgated pursuant to the requirements of the APA); *Reich* v. *New York*, 3 F.3d 581, 587 (2d Cir. 1993) (concluding that 29 C.F.R. 541.205(a), which was not subject to notice and comment, is an interpretive rule), cert. denied, 510 U.S. 1163 (1994); *Brigham* v. *Eugene Water & Elec. Bd.*, 357 F.3d 931, 940 (9th Cir. 2004) (DOL regulations at 29 C.F.R. 785.14-785.23 interpreting the FLSA's "waiting time" provision, which were issued without notice and comment, are "interpretive guidance"). Respondent's argument suffices only to demonstrate that "interpretation" is an ambiguous term that covers agency determinations of varying degrees of formality. That, in turn, provides a reason to defer to the agency (under *Auer*), not a basis to disregard the agency's interpretation of "interpretation."

(citing as an example *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257, 263 (1995)).

This clearly is an occasion for such deference. Section 552.109(a) was promulgated pursuant to notice-and-comment rulemaking (and indeed was revised in response to public comments); it was issued as part of a single comprehensive package containing all "necessary rules" for implementation of the new domestic service coverage and the exemption for companionship services; and it addresses the question at issue directly and with greater specificity than any other regulation. Section 552.109(a) thus bears ample indicia of a considered and official position calling for *Chevron* deference.

II. DOL'S THIRD-PARTY EMPLOYMENT REGULATION IS A PERMISSIBLE INTERPRETATION OF THE FLSA'S COMPANIONSHIP SERVICES EXEMPTION

Under the second step of the *Chevron* analysis, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Under this highly deferential standard, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted * * *, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Rather, courts must defer to any reasonable agency interpretation. *Mead*, 533 U.S. at 229.

The FLSA's companionship services exemption does not specifically address third-party employment. See 29 U.S.C. 213(a)(15). Rather, that issue is within the express grant of rulemaking authority to the Secretary of Labor to "define and delimit" the terms of the exemption. At a minimum, because the statute does not preclude application of the companionship exemption to third-party employment, and because 29 C.F.R. 552.109(a) is a permissible interpretation of congressional intent, the Court must defer to DOL's regulation. Def-

erence would be due, moreover, even under the standard of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because DOL's longstanding third-party employer regulation is most consistent with the statutory text and Congress's intent in enacting the FLSA's exemption for companionship services.

A. DOL's Third-Party Employer Regulation Is Supported By The Text And History Of The FLSA's Companionship Services Exemption

The statutory exemption applies to "*any* employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15) (emphasis added). Congress's use of the encompassing term "any" is naturally read to include all employees providing such services, regardless of who employs them. See, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (internal quotation marks and citation omitted).[4] See Advisory Mem., Pet. App. 51a, 63a-64a.

As DOL explained when it promulgated 29 C.F.R. 552.109(a) (see 40 Fed. Reg. at 7405) and again in its 2005 Advisory Memorandum (see Pet. App. 51a-52a), its conclusion

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[4] It is true that Sections 6(f) and 7(*l*) of the FLSA, which extend minimum wage and overtime protections to domestic service employees, indicate that the term "domestic service" itself should be construed broadly. See 29 U.S.C. 206(f) (minimum wage applies to "*[a]ny* employee * * * employed in domestic service" meeting specified income or hour requirements) (emphasis added); 29 U.S.C. 207(*l*) ("No employer shall employ *any* employee in domestic service in one or more households for a workweek longer than forty hours" unless such employee receives overtime compensation.) (emphasis added). The broad coverage provided by those sections, however, is expressly limited by the exemptions for casual babysitters and companions for the aged and infirm. Moreover, the intended broad coverage is indicated by the word "any," which of course is also used in the exemption. Thus, while Congress wanted "to include within the coverage of the Act all employees whose vocation is domestic service," it expressly *excluded* casual babysitters and companions from that coverage. S. Rep. No. 690, 93d Cong., 2d Sess. 20 (1974); see H.R. Conf. Rep. No. 113, 93d Cong., 1st Sess. 27 (1973).

that the companionship services exemption applies to third-party employers is consistent with interpretations of similarly-worded statutory exemptions that pre-dated the 1974 Amendments. See, *e.g.*, 29 C.F.R. 780.303 (exemption in 29 U.S.C. 213(a)(6)(A) for "any employee employed in agriculture" turns on "the activities of the employee rather than those of his employer"); *Holtville Alfalfa Mills, Inc.* v. *Wyatt*, 230 F.2d 398, 400, 401-402 (9th Cir. 1955) (exemption in 29 U.S.C. 213(a)(6) applies to employee who repaired equipment on a farm even though his employer owned no farm and operated none); *Tipton* v. *Associated Milk Producers, Inc.*, 398 F. Supp. 743, 747 (N.D. Tex. 1975) (same); 29 C.F.R. 780.403 (exemption in 29 U.S.C. 213(b)(12) for "any employee employed in" certain activities "may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities"). DOL therefore had a firm basis for defining the scope of the companionship exemption by reference to the activities of the employee rather than the activities of the employer.

If Congress had wanted to exclude employees of third-party employers from the exemption, it easily could have done so by expressly including a limitation based on *employer* status, as it has done with other FLSA exemptions. See, *e.g.*, 29 U.S.C. 213(a)(3) (exemption for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. 213(b)(3) ("any employee of a carrier by air"); 29 U.S.C. 207(i) ("any employee of a retail or service establishment"). Instead, Congress focused on the activity of "any employee" and expressly assigned to the Secretary the authority to determine the appropriate defini-

tions and limits of the exemption, see 29 U.S.C. 213(a)(15), which the Secretary did in 29 C.F.R. 552.109(a).[5]

From the outset of the rulemaking process implementing the 1974 Amendments and the companionship services exemption, DOL intended to address the question of third-party employment in 29 C.F.R. 552.109. See 39 Fed. Reg. at 35,382 (proposed rule); 40 Fed. Reg. at 7404 (final rule). DOL originally proposed using that regulation to provide that companionship services employees "employed by an employer other than the families or households using such services, are not exempt under section 13(a)(15) of the Act if the third party employer is a covered enterprise meeting the tests of sections 3(r) and 3(s)(1) of the Act." 39 Fed. Reg. at 35,385. DOL reasoned that such "employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *Ibid.*; see *Homemakers Home & Health Care Servs., Inc.* v. *Carden*, 538 F.2d 98, 100 (6th Cir. 1976). But even as originally proposed, Section 552.109(a) would have applied the exemption to *some* third-party employers—agencies or companies that were not "enterprises" covered by the Act and family members who hired the companion for the aged or infirm person.

After receiving comments from, among others, public and private social service groups, public welfare departments of state and local governments, and business firms providing

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[5] Congress has amended 29 U.S.C. 213 seven times since 1974 and has not made any changes to the exemption. See Pub. L. No. 95-151, 91 Stat. 1245 (1977); Pub. L. No. 96-70, 93 Stat. 452 (1979); Pub. L. No. 101-157, 103 Stat. 938 (1989); Pub. L. No. 103-329, 108 Stat. 2382 (1994); Pub. L. No. 104-88, 109 Stat. 803 (1995); Pub. L. No. 104-188, 110 Stat. 1755 (1996); Pub. L. No. 105-78, 111 Stat. 1467 (1997). This failure to revise or repeal DOL's longstanding interpretation of the companionship exemption "is persuasive evidence that the interpretation is the one intended by Congress," or at least is within the range of discretion Congress conferred on the agency. *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted).

domestic service workers, DOL revised its rule to exempt all employees providing companionship services, regardless of their employer. See 40 Fed. Reg. at 7405 ("On further consideration, I have concluded that the[] exemption[] can be available to * * * third party employers since [it] appl[ies] to 'any employee' engaged 'in' the enumerated services."). The agency explained that "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Ibid.*; see also Advisory Mem., Pet. App. 52a, 53a.[6]

B. The Third-Party Employer Regulation Is Consistent With Congress's Intent In Enacting The Exemption For Companionship Services

Section 552.109(a) also is consistent with Congress's intent in enacting the exemption for companionship services in the first place, and it avoids the disruption to the provision of companionship services to aged and disabled individuals that would result if the regulation were invalidated.

As DOL stated soon after promulgating 29 C.F.R. 552.109, see Op. Ltr. WH-368, 1975 WL 40991 (Nov. 25, 1975), allowing

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[6] DOL's change between its proposed rule in 1974 and the final rule adopted in 1975, in response to comments, is not a reason to deny *Chevron* deference to Section 552.109(a). See *Yellow Transp.*, 537 U.S. at 45 (applying *Chevron* where agency's position changed from proposed rule to final rule). Such modifications are at the very "heart of the rulemaking process." *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 371-372 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). Further, respondent's argument that the third-party employer regulation is procedurally defective under the APA, 5 U.S.C. 551 *et seq.*, is not properly before the Court because it was not timely raised, Pet. App. 38a n.3, and the court of appeals did not decide the issue, *id.* at 27a-28a. The argument is also meritless. DOL satisfied the APA's requirement at 5 U.S.C. 553(b)(3) by setting forth the terms of the proposed Part 552, including the third-party employer regulation, and then issuing a final rule that was a logical outgrowth of the proposal. See 39 Fed. Reg. at 35,383-35,385; *United Steelworkers of Am.* v. *Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1981). Moreover, following notice and comment in 1993, 1995, and 2001, DOL retained Section 552.109(a) as worded. See pp. 4-5, *supra*.

the exemption for all employees providing companionship services, regardless of the identity of their employer, is consistent with Congress's intent to keep such services affordable. See 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick); *id.* at 24,798 (statement of Sen. Johnston); *id.* at 24,801 (statement of Sen. Burdick); *Welding*, 353 F.3d at 1217 ("Congress created the companionship services exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them.") (internal quotation marks and citation omitted). This affordability concern applies regardless of whether a person needing care employs a companion directly or uses a third-party agency to obtain such services.

Indeed, as DOL recognized when it decided not to revoke the third-party employer regulation in 2002, the cost of companionship services would dramatically increase without the exemption. See 67 Fed. Reg. at 16,668 (citing comments from, among others, the SBA and HHS, expressing concern that extending the FLSA's minimum wage and overtime coverage to companions employed by third parties would increase the cost of such services). That is a concern not only for persons who need those services, but also for third-party providers, whose reimbursement is generally fixed through Medicare and Medicaid, see, *e.g.*, Nat'l Ass'n for Home Care & Hospice, Inc. (NAHC) Amicus Cert. Br. 7-8, and for the federal government, because Medicare and Medicaid together pay more than half of the revenues to freestanding agencies. See 66 Fed. Reg. at 5483 ("40 and 15 percent, respectively").

Eliminating the third-party employer regulation would have a substantial impact on home care beyond increased costs, and could cause disruption in the care that frail elderly and disabled individuals currently receive. For example, a number of home care providers believe that they would need to limit workers to 40 hours of work each week to control costs if the exemption were not available. See, *e.g.*, City of

New York Amici Cert. Br. 8; Home Care Council of New York City Amicus Cert. Br. 8-9. Such a reduction in workers' hours would likely disrupt continuity of care, as many individuals requiring companionship services need care for a significant portion of the day and night, including, in some cases, round-the-clock care. Continuing Care Leadership Coalition Amicus Br. 8. In addition, home care providers have expressed concern that restricting companions to 40 hours of work each week could make it more difficult for those needing care to find it. City of New York Amici Cert. Br. 8, 11. Such difficulties would lead to increased institutionalization, which is contrary to government policy. See *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 599-602 (1999); Exec. Order No. 13,217, 3 C.F.R. 774 (Community-Based Alternatives for Individuals with Disabilities). Nor is it obvious that the caregivers would benefit. Some providers predict that caregivers' total pay would actually be reduced because they would no longer be able to depend on working overtime hours to supplement their income. See New York State Ass'n of Health Care Providers Amicus Cert. Br. 6. Moreover, the effects of limiting the companionship services exemption to individual employment would visit the greatest hardship on those elderly or infirm individuals—for example, those with Alzheimer's disease—who may be incapable of acting as employers. See Home Care Ass'n of New York State Amicus Cert. Br. 17; NAHC Amicus Cert. Br. 6.

Limiting the exemption to individual employment also would deny the companionship exemption where a family member hires a companion for an elderly or infirm relative living in another household. There is no indication in the FLSA itself, or its legislative history, that Congress intended that result. Indeed, consistent with the textual reference to "any employee," there is no legal or policy justification for treating employees providing companionship services differently under the FLSA based on the identity of the employer.

The changing nature of the home care industry highlights the importance of allowing the exemption for all companionship services employees, regardless of their employer. Since Congress enacted the exemption, "[t]he number of for-profit agencies [providing companionship services] * * * increased * * * from 47 in 1975 to 3,129 in 1999." 66 Fed. Reg. at 5483. Given the number of agencies now providing these services, "[i]f the companionship services exemption to the FLSA was narrowed to only those employees hired directly by a family member or the head of household, then the exemption would encompass only 2% of employees providing companionship services in private homes." *Fernandez* v. *Elder Care Option, Inc.*, No. 03-21998 (S.D. Fla. July 29, 2005), slip op. 45-46 (citing 66 Fed. Reg. at 5483), appeal docketed, No. 05-16806 (11th Cir. filed Dec. 5, 2005). Such an outcome would not be consistent with Congress's intent to ensure the availability and affordability of those services for working Americans.

C. DOL's Third-Party Employer Regulation Is Consistent With Other DOL Regulations

The court of appeals on remand acknowledged that consideration of congressional intent "does not lead to any definitive conclusion" about the validity of Section 552.109(a). Pet. App. 4a-5a. The court nonetheless invalidated that longstanding regulation because it concluded that it is inconsistent with other DOL regulations, particularly 29 C.F.R. 552.3, which the court believed clearly limit the companionship services exemption to employees working in the private home of the person by whom she is employed. Pet. App. 4a-5a, 30a. Section 552.3's general definition of "domestic service employment," however, does not support disregarding Section 552.109(a)'s specific treatment of third-party employers.

At the time the regulation was promulgated, DOL demonstrated its understanding that Section 552.3 did not resolve the issue of third-party employment by including a separate section expressly addressing the subject in the context of

companionship services, Section 552.109. See 40 Fed. Reg. at 7407. If the definition of domestic service employment in Section 552.3 had already excluded employees of third parties, there would have been no point to the promulgation of Section 552.109(a). But DOL *did* promulgate Section 552.109(a), which expressly includes employees of third parties within the exemption. DOL surely did not intend, in the same rulemaking, to both exclude such third-party employees from the exemption under Section 552.3 and include them under Section 552.109(a). To be sure, Section 552.3 could have referred to the home "of the person by" *or for* "whom he or she is employed." But the absence of such language cannot suffice to defeat the specific direction provided by Section 552.109(a). Moreover, although the court of appeals believed that the version of Section 552.109 proposed by DOL in 1974 supported its conclusion, see Pet. App. 13a, 30a-31a, it does not. As originally proposed, Section 552.109 would have applied the exemption to some third-party employers (*i.e.*, those that did not satisfy the "enterprise" test for coverage), and family members living in another household), and therefore even the original proposal would have been inconsistent with the court of appeals' reading of Section 552.3.

As DOL's Advisory Memorandum explains, Section 552.3 does not limit the companionship services exemption to individual employment, because its general definition of domestic service employment addresses not the status of the employer, but rather types of covered services and where they must be provided. Section 552.109(a) is the *only* regulation that addresses third-party employment. See Pet. App. 51a-63a. The agency's interpretation of its own regulations is entitled to controlling deference. *Auer*, 519 U.S. at 461-463. Section 552.3 does incorporate language from the Act's legislative history in its definition of "domestic service employment" as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3; see also

Advisory Mem., Pet. App. 57a-59a. However, when DOL borrowed this language from the congressional committee reports, it intended to adopt Congress's emphasis on the nature of the *employee's activities* and the *place* where those activities are performed; it did not intend to impose any limitation on the identity or status of the *employer*. See *id.* at 58a-59a.

As DOL pointed out in its Advisory Memorandum, Congress never directly addressed the issue of employer identity during its consideration of the companionship services exemption but, rather, focused on the employee's activities and where those activities are performed. Pet. App. 52a-53a, 57a-58a. The legislative history refers to regulations addressing "[d]omestic service in a private home of the employer" in the Social Security context, 26 C.F.R. 31.3121(a)(7)-1(a)(2), and a "generally accepted meaning" of the term "domestic service" that "relates to services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed," S. Rep. No. 300, 93d Cong., 1st Sess. 22 (1973), to address the kind of work that Congress sought to cover as "domestic service." Those references do not establish an intent to limit either FLSA coverage of domestic service employees, or the companionship services exemption, based on the identity of the employer. See Advisory Mem., Pet. App. 52a-53a, 57a-58a. Instead, in addressing the companionship exemption, "[m]ost of the statements of the Congressmen focus on the nature of companionship services (e.g., 'elder-sitting' or providing companionship to an elderly person through conversation and shared activities) and the location of such services (ensuring affordable care for the elderly within their own homes), rather than the employer." *Fernandez*, slip op. 44-45.[7]

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[7] Under the Social Security system, a tax is imposed on wages and benefits are based on wages. See 26 U.S.C. 3101(a) and (b); 42 U.S.C. 402(a), 415. "Wages" generally means all remuneration for employment. 26 U.S.C. 3121(a); 42 U.S.C. 409(a). One exception excludes wages below a certain threshold paid for "domestic service in a private home of the employer." 26 U.S.C.

Moreover, the committee reports' description of the individuals who would benefit from the companionship services exemption, namely, individuals who are "unable to care for themselves," H.R. Rep. No. 913, 93d Cong., 2d Sess. 46 (1974); see also S. Rep. No. 690, 93d Cong., 2d Sess. 20 (1974), suggests that Congress did not intend to exclude those most acutely in need of help—*i.e.*, individuals who are not capable of acting as an employer. See, *e.g.*, Home Care Ass'n of NY State Amicus Cert. Br. 17. Thus, Section 552.3 should not be read as having so limited the companionship services exemption.[8]

D. Invalidating DOL's Third-Party Employer Regulation Would Have Substantial Negative Consequences

Respondent's and the court of appeals' contrary reading of Section 552.3 as excluding third-party employment would create a number of other problems. First, that reading would create an inconsistency with DOL's regulation at 29 C.F.R. 552.101, which elaborates on the definition of domestic service employment set out in Section 552.3. Section 552.101 states that "the term [domestic service employment] includes persons who are frequently referred to as 'private household workers.'" 29 C.F.R. 552.101(a). Both DOL and Congress

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3121(a)(7)(A) and (B); 42 U.S.C. 409(a)(6)(A) and (B). The Social Security regulations to which the legislative history of the 1974 Amendments referred address the kind of work that qualifies for this exception. That work differs in some respects from another kind of "domestic service" performed by college students in college clubs, fraternities, and sororities that is not considered "employment" for Social Security purposes pursuant to 26 U.S.C. 3121(b)(2) and 42 U.S.C. 410(a)(2). See 26 C.F.R. 31.3121(b)(2)-1; 20 C.F.R. 404.1009(b) (1974). The existence of both types of "domestic service" in the Social Security regulations highlights that the "private home of the employer" language in the FLSA's legislative history was used to distinguish domestic service performed *in a private home* from such service performed in a different setting.

[8] DOL's references to domestic services in the home "of the employer," in describing the scope of coverage for babysitters, see 29 C.F.R. 552.105(a), like the references in 29 C.F.R. 552.3 and 552.101(a), is used to distinguish service in a private household from service outside the household.

understood the phrase "private household workers" to include employees of third-party employers. Advisory Mem., Pet. App. 61a-62a (citing references in legislative history to DOL's 1973 Report to Congress defining "private household workers" as "anyone aged 14 and over working for wages * * * in or about a private residence who was employed by * * * a household service business whose services had been requested by a member of the household occupying that residence"). Because Section 552.101(a) thus includes at least some domestic workers employed by third parties within the definition of domestic service employees, it makes no sense to construe Section 552.3's language that domestic service be performed "in or about the private home of the employer" as excluding them. *Id.* at 62a.

Second, reading Section 552.3 as excluding third-party employment would affect not only the scope of the exemption but would actually exclude many domestic service workers from FLSA coverage in the first instance, despite Congress's intent to cover "*all* employees whose vocation is domestic service," with the exception only of casual babysitters and companions for the aged and infirm. S. Rep. No. 690, *supra*, at 20 (emphasis added); see also H.R. Conf. Rep. No. 413, 93d Cong., 1st Sess. 27 (1973) (same).[9] Before the 1974 Amendments, two categories of domestic workers generally were not covered under the Act: those employed by homeowners because there usually was no basis for individual coverage, and those employed by third parties that did not meet the test for enterprise coverage. See 29 U.S.C. 203(s) (1970) (defining "covered enterprises" as businesses with annual gross sales of at least $250,000 that employed at least two employees in

[9] As DOL explained in its Advisory Memorandum, although Section 552.3 states that it defines domestic service employment "[a]s used in section 13(a)(15) of the Act," "the Department in fact intended the provision to supply a general definition of the term as used throughout the Act." Pet. App. 60a n.1. Thus, Section 552.3's definition applies equally to the general coverage of domestic service workers and the companionship services exemption.

interstate commerce). Congress clearly intended the 1974 Amendments generally to cover both of those categories of workers, with a few expressly enumerated exceptions, such as for companions. See S. Rep. No. 690, *supra*, at 20; H.R. Conf. Rep. No. 413, *supra*, at 27 (same). But if Section 552.3 were construed to exclude third-party employers from the definition of domestic service employment, then those domestic workers who are employed by third-party employers that are not covered enterprises would, to this day, not be covered by the FLSA. That result is contrary to clear congressional intent. Advisory Mem., Pet. App. 60a.

DOL's reading of Sections 552.3 and 552.109(a) as complementary (with only the latter specifically addressing the question here), rather than contradictory, gives effect to each provision and is therefore consistent with the obligation to read a regulation "so as to give effect, if possible, to all of its provisions." *Jay* v. *Boyd*, 351 U.S. 345, 360 (1956). Moreover, DOL's statement in its Advisory Memorandum that "[t]he regulations address the issue of third-party employment in only one place—section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption," Pet. App. 54a,—is itself entitled to controlling deference, as is DOL's full and fair consideration of its own regulations expressed in this brief. See *Auer*, 519 U.S. at 461-463 (controlling deference to DOL's interpretation of FLSA regulation expressed in amicus brief to the Court). Thus, this Court should conclude that there is no conflict between Sections 552.3 and 552.109(a), and that Section 552.109(a) alone—and permissibly—addresses the question of third-party employment.[10]

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[10] DOL's previous statements in its notices of proposed rulemaking that Sections 552.3 and 552.109(a) were inconsistent, see, *e.g.*, 66 Fed. Reg. at 5485, are entitled to little weight because they were expressed in proposed amendments to Section 552.109 that were never promulgated as a final rule. See *Schor*, 478 U.S. at 845 ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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is entitled to consider alternative interpretations before settling on the view it considers most sound."). In any event, the Advisory Memorandum expressly repudiates and withdraws those and all other previous inconsistent statements, thus clarifying any ambiguity they may have caused. Pet. App. 63a; see, *e.g.*, Wage and Hour Division, Field Operations Handbook § 11d00(c) (1994).